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Supreme Court of the United States

October Term 1949

No. 490

THE UNITED STATES OF AMERICA,
Appellant,

vs.

COTTON VALLEY OPERATORS COMMITTEE, ET AL.,
Appellees

BRIEF FOR APPELLEES STANOLIND OIL AND GAS COMPANY AND TEXAS GULF PRODUCING COMPANY

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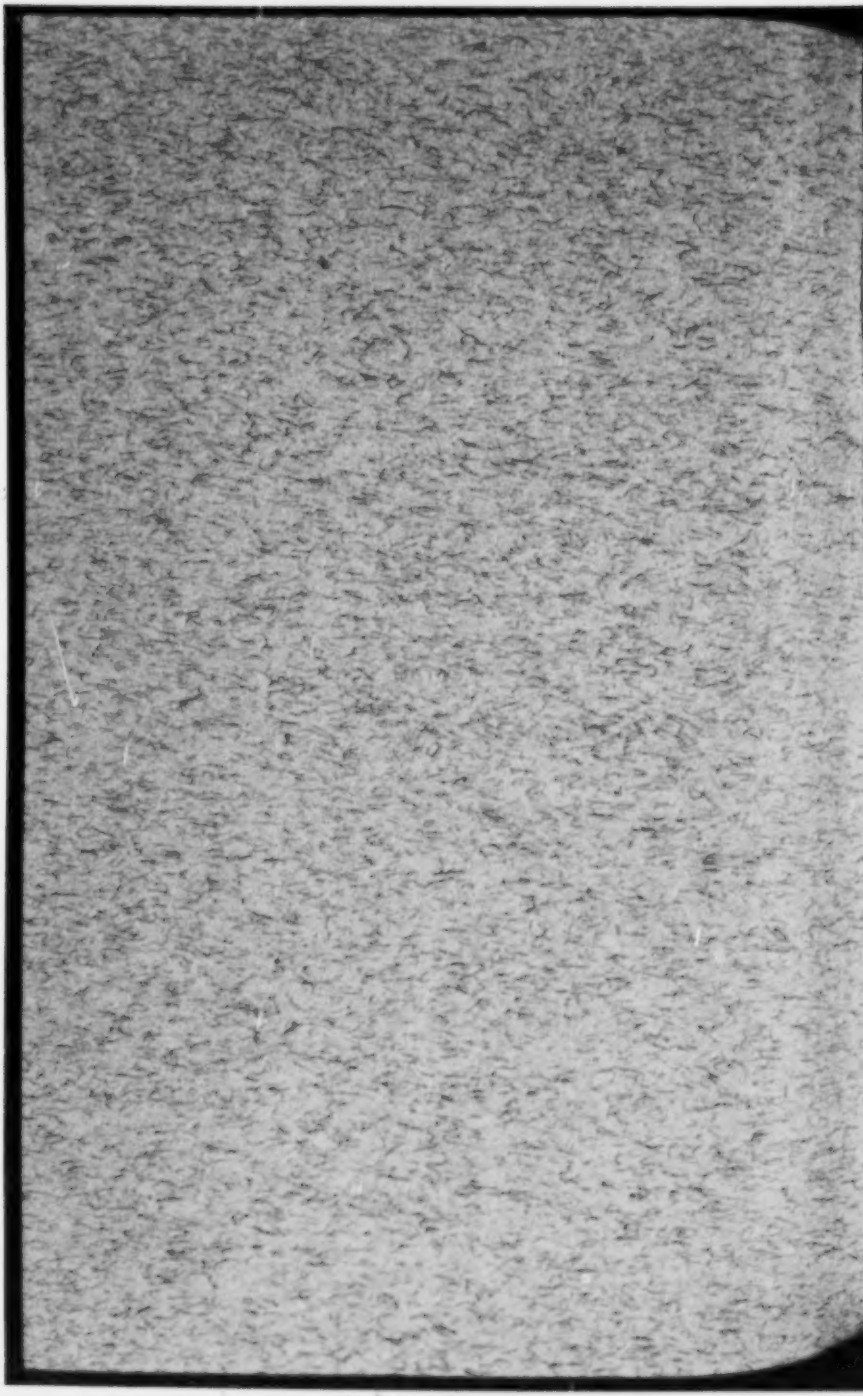

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Statement of the Facts of the Case and Issues Arising Thereon

Appellant's statement of the case is in part incorrect and in part incomplete, omitting vitally essential details. It therefore presents an incorrect view of the case. The sole position taken by the appellant in the district court was that the Attorney General himself

was "exclusively" vested with the power to determine whether the documents called for in the motion to produce were privileged and that he had made that determination and nothing remained to be done except to communicate the determination to the court. The sole function of the court, according to the position then taken, was to receive the determination made by the Attorney General and give full effect to it against the appellees. (R. 163, 218-220.) No mention was made of an alleged failure to show "good cause." In this Court appellant now asserts that Ohio Oil Company's motion to produce (adopted by the appellees filing this brief) was not supported by a showing of "good cause."

How could there be "good cause" determinable by the court when the whole issue as to whether the documents should be produced was determinable by the Attorney General "exclusively?" However much "good cause" might have been shown, the cause as determined by the court would be a mere futility when faced by the finding of the Attorney General that all of the documents were privileged. If the failure to show "good cause" objection had been urged, appellees could have amended their motion; but, even then, the amendment, however sufficient, would have amounted to nothing, in the face of the Attorney General's determination that the documents were privileged and were therefore inadmissible, "good cause" or no "good cause." It would have been impossible to show "good cause" for the production of the documents that were privileged.

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Additional Statement

1. *The question of privilege was determinable by the Court and not by the Attorney General.*

We think that an additional statement is needed to put before the Court the precise question to be determined.

Question Presented

The question presented is not whether the documents should be produced for inspection and copying by the defendants. Originally that was the issue tendered by the motion to produce. (R. 33.) But, after various hearings were held (R. 56, 77, 159, 212-220), the issue finally narrowed itself to this single question:

Whether in a proceeding such as this, in which the United States is the moving party, the exclusive right to determine the privileged nature of the documents in the possession of the Attorney General is vested in the Attorney General or in the court trying the case.

The position of the Government on the question is shown by the following statement of the Assistant Attorney General to the district court (R. 197):

"Mr. Britt: May it please the Court, we are here today on a motion by the government to vacate an order made on March 11th on the motion of the Ohio Oil Company to require the government to produce reports made to the Attorney General by agents of

the Federal Bureau of Investigation. The substance of the order was that the reports be submitted to the court for its determination as to whether or not they were privileged. The Attorney General, in an affidavit, has taken the position which is uniform throughout the country that the determination of whether these reports are privileged lies within his discretion exclusively."

The question was emphasized as shown by the following colloquy between the Assistant Attorney General and the district court (R. 217-218):

"THE COURT: * * * *.

"I am not convinced that the matter of privilege should be left exclusively to the Attorney General, but I believe it is my duty to determine this question by an examination of the documents.

"MR. BRITT: May it please the Court, as I indicated this morning, I have been ordered to come before your Honor and say that I have the reports with me, but it is my instruction to respectfully decline to produce them to your Honor under these circumstances.

"THE COURT: Mr. Britt, the only alternative then, as I appreciate it, is to direct you to do that within a fixed time, and if it is not done within that fixed time to dismiss the suit.

"MR. BRITT: Well, that is the way it is, your Honor.

"THE COURT: I see no other course to take except to follow this course as a legal solution to the matter, so you will be given a certain length of time, after which if you fail to produce the case will have to be dismissed.

"Of course, you would have the right then to go to the Appellate Court.

"MR. BRITT: I think that would be a very good course to follow, your Honor.

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"THE COURT: Then I will give you 10 days in which to submit these documents to the Court, and if not done within that time then this suit will be dismissed.

"MR. BRITT: I am perfectly willing for the time to start now, if your Honor pleases. I have them here, and I still refuse to produce them.

"THE COURT: All right, let the suit be dismissed at this time."

The chronological order of events which resulted in the question and the reasoning of the district court thereon is shown by the following final judgment entered by the district court (R. 218-220):

"*Judgment and Order Filed Sept. 20, 1949.*

"On November 7, 1947, the Ohio Oil Company, one of the defendants in this case, filed a motion to require plaintiff to produce for inspection, certain documents, including reports of the Federal Bureau of Investigation, correspondence, etc., with various persons, all as stated in said motion, which is made part hereof. Similar motions were filed by the other defendants. The Court, having recalled and quashed certain subpoenas *duces tecum*, obtained *ex parte* by the Magnolia Petroleum Company, another defendant, for reasons stated in the written opinion on January 2, 1948, its attention was called to the fact that it had not passed upon the said motion of The Ohio Oil Company. Being of the impression that the latter was, in all material respects, similar to the motion to produce and subpoenas *duces tecum* previously disposed of on said January 2, 1948, the said motion of the Ohio Oil Company was, on April 21, 1948, denied in a memorandum opinion filed April 22, and as appears from a written order to that effect filed June 1, 1948.

"Counsel for other defendants had filed similar motions to produce and, at the several hearings, appeared and joined in the contentions of The Ohio Oil Company.

"Thereafter, on August 26, 1948, the said The Ohio Oil Company filed a motion to vacate the said order of April 21, 1948, which had denied its motion to produce and this was argued and submitted on September 17, 1948. Subsequently, the matter was, on February 21, 1949, reset for hearing on March 11, 1949, at which time, having heard further arguments, it was ordered that the Government produce the documents requested by The Ohio Oil Company 'with the right to submit to the Court for ruling any documents they desired to claim to be privileged.'

"On May 10, 1949, plaintiff filed a motion to vacate said order of March 11, 1949, and on June 15, following, it was heard and defendants declined to accept the Government's offer of partial compliance by filing an abstract of factual information contained in the reports of the Federal Bureau of Investigation, and the Court indicated its purpose to adhere to the ruling requiring the Government to produce the documents. At this time counsel for the Government requested time to contact the Attorney General, before the Court finally ruled on the said motion to vacate, which was granted, and on the following day, June 16, 1949, when the hearing was resumed and the Court denied the said motion to vacate, counsel for the Government was given additional time to consult with the Attorney General as to whether the Court's order to produce would be complied with, and the question of what was to be done in case of refusal was reset for July 7, 1949.

"On the last mentioned date, counsel for the Government appeared and submitted further authorities as to the right of the Attorney General to claim and for himself determine the question of pri-

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vilege as to the documents called for in the motions to produce. Thereupon, after considering said cases, the Court stated from the Bench that to sustain this contention, would in effect, amount to an abdication of the Court's duty to decide the matter and leave it entirely in the hands of the Attorney General; that if the documents were submitted to the Court, with such claims as to privilege as the Attorney General desired to make, they would be considered and if it appeared, in the Court's judgment, that production of any part thereof would be injurious to public interest, they would be excluded; otherwise, the order to produce for the inspection of defendants would be sustained. This, having been declined, counsel was told that a reasonable time would be allowed for further consideration, and the latter, stating no additional time was desired, the Court announced that the only course left was to dismiss the complaint for failure to comply with its orders. All the motions by both sides, above enumerated, and the minutes of the Court, and notes of the court reporter are made part hereof.

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT this cause be dismissed for the failure of plaintiff to comply with the Court's order to produce for its inspection the documents called for in the motions, so it could determine the question of privilege under the law.

"Done and signed on this September 19th, 1949."

2. *The claim of the Government that there was a failure to show "good cause."*

Nothing was said at the final hearing or at any prior hearing to the effect that the defendants had failed to show "good cause." That issue was not even mentioned in the district court and no decision in respect of it was made by the district court.

What is quoted above made it perfectly plain that the cause was dismissed "for failure of the plaintiff to comply with the Court's order to produce for its inspection the documents called for in the motions, so it could determine the question of privilege *under the law.*" (R. 220; italics supplied.)

That was the only question presented in the district court and it is the only question reviewable here. The issue of alleged failure to show "good cause" was tendered for the first time in appellant's Assignment of Errors (No. 6), filed under Rule 13 of this Court. (R. 222-223.) It is a question presented originally to this Court.

The Government filed its "*Motion to Vacate Order of March 11, 1949, Directing the Plaintiff to Produce Reports Made by Agents of the Federal Bureau of Investigation.*" (R. 161.) It attached to this motion to vacate a lengthy affidavit of the Attorney General, in which he claimed that the documents called for in the motion to produce were all confidential and that the power to determine the issue of privilege was "exclusively within the exercise of the judgment of the Attorney General." Further, that his assistants had advised him "of the nature of the contents" of the documents called for and that he had determined, in the exercise of the power exclusively vested in him, that they were privileged and hence would not be produced even for inspection by the court. (R. 162-164.) That was the sole ground presented in the motion to vacate the order to produce.

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Summary of the Argument

1. When the United States, as plaintiff, comes into one of its courts, it must submit to the rules applicable to all other litigants coming into that court. It comes into one of its courts, not as a sovereign or the Government, but simply as an ordinary litigant.

2. When the Attorney General filed a formal affidavit claiming that the documents were privileged, he, in effect, tendered the issue of privilege to the court for determination. As attorney for one of the litigants, he had no more authority to determine that issue with finality and conclusiveness thar had the attorney for any other litigant. Like any other attorney, he could present the claim of privilege but he could not determine it.

3. The Attorney General in refusing to produce the documents was acting as an attorney for the Government. His refusal to produce had no more effect than the refusal of an attorney for any other litigant.

4. Whether the documents were privileged was a judicial question, determinable only by the judicial department of the Government. It could not be determined by the executive department of the Government. The executive department is not entitled to participate with the judiciary in the performance of essentially judicial functions. If it be admitted that the executive regulation as to the privileged character of the documents in question is supreme when the question arises in the executive field, it can not be such when it arises in the judicial field.

5. The executive regulation on which the Government relies, purportedly promulgated under R. S. 161 (5 U.S.C.A. 22), properly construed, was not effective to entitle the Attorney General to participate in the judicial process of determining the admissibility of evidence upon a trial in one of the courts of the United States. The very statute under which it was promulgated requires that such a regulation not be "inconsistent with law." It would be inconsistent with law if it authorized the Attorney General, acting as attorney for the United States, to determine whether evidence was privileged and for that reason inadmissible upon a trial conducted in one of the courts of the United States. Whether evidence is admissible upon a trial is essentially a judicial question and a member of the executive department is not entitled to participate in its decision. The Government's position is in conflict with many decisions having classic standing, notably *Hayburn's Case*, 2 Dallas 409 (all three opinions) and *Gordon v. United States*, 117 U.S. 697, to say nothing of many others.

6. *Boske v. Comingore*, 177 U. S. 459, so strongly relied upon by the Government is not applicable. The Government was not a party to that action. It therefore could not possibly have involved the question that is involved in this action—the duty of the Government, as a litigant, to conform to the Rules of Civil Procedure binding on all *litigants*, including the Government. The regulation considered in that case was simply one of the Secretary of the Treasury for-

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bidding his subordinates to allow the use of official papers except for the purpose of aiding in the collection of the revenues of the United States.

7. In the *Boske* case it was held that the administrative regulation was not "inconsistent with law." In the instant case it is in effect contended that the administrative regulation is "inconsistent with law;" that is, it is admittedly inconsistent with the Rules of Civil Procedure relating to discovery, and particularly Rule 34.

8. The question as to whether "good cause" was shown was not raised in the district court. The Government stood on the claim of privilege formally presented in an affidavit filed by the Attorney General himself. (R. 169.) The Government filed its "Motion to Vacate" the order requiring production of the documents and set out in the motion the single ground upon which it relied—that the documents were privileged. The claim that "good cause" was not shown, not having been presented to the district court, it cannot be presented for the first time here. (Rule 46.)

9. Sufficient "good cause" was shown to compel the production of the documents at least for the limited purpose of enabling the court to determine the question of privilege which had been formally and *voluntarily* tendered by the Attorney General in an affidavit. Especially is this true when the Attorney General's representative admitted that he had the documents in his possession, in the very presence of the court, and yet refused to produce them for the limited purpose of judicial inspection.

BRIEF OF ARGUMENT

I.

The question of privilege was determinable by the court and not by the Attorney General.

The question presented for decision is obviously an important one. Defendants contend that the question of privilege is one for judicial determination, just as any other question concerning the admissibility of evidence. It is a question for determination by the court in which the action is pending. *Contra*, the Government claims that the question of privilege is an executive one, to be exclusively determined by the Attorney General, and that when he has made the determination, it is final. The court is made a mere dummy, whose determination, if it makes any, has no effect whatever when faced by a contrary determination of the Attorney General. The opposing party is helpless. The Rules of Civil Procedure relating to discovery are completely defeated in their operation. The result is one kind of trial between ordinary litigants and a wholly different kind of trial—a one-sided trial—when the Government is a party. The Rules of Civil Procedure become inoperative against the Government. The Government becomes a favored litigant, entitled to withhold its evidence from the court even for the limited purpose of an examination of that evidence by the court to determine whether such evidence is in fact privileged and therefore inadmissible. The question as to whether certain evidence is confidential and privileged is but a question of admissibility of that evidence.

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If the Attorney General, acting in his capacity as attorney for the Government, has the power to determine with finality and conclusiveness that certain evidence is inadmissible because privileged, then he had as well be vested with the power to determine in the same way, and with the same conclusiveness, all questions relating to the materiality and relevancy of evidence and the competency of witnesses.

The contention of the Government that power is vested in the Attorney General to determine the question of privilege and to force his determination on the court, whether right or wrong, is wholly erroneous and entirely untenable. It is in conflict with many decided cases and in conflict with the Federal Rules of Civil Procedure.

Note that the claim of privilege is a broad and general one, not based upon any specific allegation of fact concerning the nature of the documents. The claim is simply that the F. B. I. reports and the correspondence of the Attorney General, regardless of their contents, are confidential and privileged and their production cannot be compelled in any court. The "Motion to Vacate"—the only pleading filed by the Government in opposition to the discovery—presented nothing except the general claim that the documents, regardless of their contents, were, as a matter of law, confidential and privileged and that no one was entitled to examine them to determine that fact except the Attorney General himself.

The main, if not sole, reliance is on *Boske v. Comingore*, 177 U. S. 459. That reliance is without support.

Rule 1, entitled "Scope of Rules," provides:

"These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 81 here referred to states the exceptions. Many are stated but none is stated exempting the United States from the rule or giving the Attorney General the right, through a mere administrative regulation, to add to, alter, amend or defeat the law set forth in the Federal Rules of Civil Procedure.

The very way in which the Government attempts to use the Attorney General's regulation demonstrates that it is void. The Government affirms that the force of the regulation is such as, in effect, to exempt the Government from the duty to produce, under Rule 34, the documents and records in the possession of the Attorney General. Under Rule 34, whether such records and documents shall be produced depends upon a judicial decision. They say that the regulation makes it depend upon an administrative or executive decision by the Attorney General. If that be true, then the regulation must fall. Rule 34 is a law and must stand. In *Morrill v. Jones*, 106 U. S. 466, 467, this Court said:

"The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceedings to carry into effect what Congress has enacted. In the present case we are entirely satisfied the regulation acted

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upon by the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit duty free all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

In the case of *United States v. George*, 228 U. S. 14, 20, 21, this Court held that certain sections of the Revised Statutes, including Section 161, *here invoked by the Government*, conferred "administrative power only"; that this was indubitably true of Section 161, and that therefore a regulation promulgated under it, in conflict with a statute, could not stand.

In *International Ry. Co. v. Davidson*, 257 U. S. 506, 514, the Court, citing *United States v. George*, *supra*, and *Morrill v. Jones*, *supra*, said:

"Section 161 does not confer upon the Secretary any legislative power."

Here it is in effect claimed that the regulation promulgated by the Attorney General under Section 161 has the force of legislation, because, according to the Government, it has amended Rule 34, which, before amendment, was applicable to all litigants, including the United States.

The same ruling was made in the later case of *Williamson v. United States*, 207 U. S. 425, 462, involving a regulation of the General Land Office. Discussing the broad power of the Commissioner of the General Land Office to adopt rules and regulations, this Court said:

"* * * But this power must in the nature of things be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations destructive of rights which Congress had conferred."

The same ruling was made in *United States v. United Verde Copper Co.*, 196 U. S. 207, 215. In that case the Court, dealing with a regulation promulgated by the Secretary of the Interior, said:

"* * * If rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary."

Many other authorities might be cited but we deem this wholly unnecessary. The Government in its brief has demonstrated that the Attorney General's regulation, if in conflict with Rule 34 or if altering or amending that rule in any respect whatever, is absolutely void.

The Federal Rules of Civil Procedure have the force of law. Considered as a whole, they constitute

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the law prescribing how *all suits* of a civil nature shall be tried in the courts of the United States. An administrative regulation promulgated by an executive officer can have no force in the face of these conflicting rules.

The requirement in R. S. 161 that the regulations must not be "inconsistent with law" means *any law*, statutory or general, including the law of evidence. It means that an executive officer cannot amend or alter the law of evidence by a mere regulation.

The Federal Rules of Civil Procedure became effective on September 1, 1938. (Rule 86.) The Attorney General's order, purporting to give a confidential and privileged character to "all official files, documents and records and information in the offices of the Department of Justice," was promulgated under date of May 2, 1939. The effect here claimed for this administrative order No. 3229 is that it amended or repealed, in part, the discovery rules, including Rule 34, set forth in the Federal Rules of Civil Procedure that became effective nearly one year prior to th effective date of said executive order No. 3229. (R. 24.) To state the question thus raised is enough. The Attorney General could not by any administrative regulation either alter, amend or repeal the discovery rules set forth in the Federal Rules of Civil Procedure. He could not exempt himself and the Department of Justice from these discovery rules.

As we have said, the Government relies upon *Boske v. Comingore*. It relies on that case too much and its reliance is misplaced. Insofar as that case may be in conflict with Rule 34, it announces a rule of decision outmoded by the Federal Rules of Civil Pro-

cedure. It must yield to them, not only because they are laws later in point of time, but because the *Boske* case involved merely an administrative regulation promulgated by an executive officer and required by the supporting law to be "not inconsistent with law." Nothing can be gotten out of the *Boske* case to support the position taken here, which is that the Attorney General's regulation has created an exception to Rule 34, otherwise applicable to all litigants. That exception is that the Attorney General is entitled to participate in the judicial process of determining whether the documents in his possession are privileged and to participate in such a way as to override and wholly defeat any opposing determination of the court trying the case.

Furthermore, as we have shown in the Summary of Argument the *Boske* opinion does not support the interpretation placed upon it by the Government. The United States was not a party to that action. The opinion, therefore, could not have prescribed any authoritative rule in respect of the question of privilege presented in an action brought by the Government. That case could not have held that under the *present* Rules of Civil Procedure the Attorney General may participate with the court in performing the essentially and exclusive judicial function of determining the question of privilege.

As we have already pointed out, in the *Boske* case it was held that the administrative regulation was not "inconsistent with law." Here it is admitted, and of necessity even contended, that the administrative regulation is "inconsistent with law." It is con-

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tended that its effect was to amend Rule 34 and the other discovery rules putting the Government on a level with all other litigants.

The following Federal cases hold that the United States, becoming a litigant, stands on a level with all other litigants:

The Siren, 7 Wall. 152;
United States v. The Thekla, 266 U. S. 328, 339-340;
United States v. General Motors Corporation, 2 F.R.D. 528, 530.

In *United States v. Yellow Cab Company*, decided December 5, 1949 (94 L. Ed. adv. sheet No. 3, p. 123), it was held that the Rules of Civil Procedure apply to appeals by the Government "as well as to those by other litigants." This holding applies also to the discovery rules. They apply to the Government in the same way as to all other litigants unless they have been repealed or amended perforce by Order No. 3229 of the Attorney General, promulgated by him after the Rules of Civil Procedure were already adopted.

See also *Bank Line v. United States*, 163 F. (2d) 133, 138.

There are many other cases but we deem it unnecessary to cite them. There is no conflict in the judicial statement of the rule.

The Government's position as taken in this case is in conflict with the essential nature of the judicial process.

The executive, the legislative, and the judiciary, is each supreme in its own field. Admit that the exe-

cutive's regulation as to the privileged character of the documents in question is supreme when the question arises in the executive field, it cannot be in the judicial field. The judiciary must be supreme and its determination binding in matters judicial even though one of the litigants is the United States. This is shown by *Hayburn's Case*, 2 Dallas 409, and by *Gordon v. United States*, 117 U. S. 697, and the line of cases dealing with the Court of Claims which held that the determination by a constitutional federal court (and this includes district courts) could not be subject to executive action. To hold to the contrary would make the judiciary subservient to the executive; render the judiciary but an arm of the executive; and rob the matter before the court of its justiciability.

Even where the United States has consented to be sued and is the *defendant*, the executive still may not supervise judicial action. *United States v. Gordon, supra.* *A fortiori* should this be true where the United States is *plaintiff*. The essence of the judicial process is that the court decides, and its decision must bind the litigants, including the United States. Here, if the Government's position be sustained, the court makes no real decision concerning the admissibility of this evidence claimed to be privileged. The question of privilege is not decided by it but by the Attorney General.

Note that the district court is not compelling the plaintiff to disclose its information, claimed to be secret and confidential; nor punishing its lawyers for contempt. The judiciary has carefully avoided impinging upon the executive but if the executive wants

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a judicial adjudication on the merits, the executive, like all other litigants, must submit its claim of privilege to, and abide by, the decision of the court. The court leaves it open to the executive to preserve the alleged secret and confidential character of its information simply by keeping it, and the transaction to which it is related, out of court. But the Attorney General is not entitled to put a blindfold on the court and have it announce a decision, never arrived at by it, but only by him.

We cite *Crosby v. Pac. S.S. Line*, 133 F. (2d) 470, 475, cert. den. 319 U.S. 752; *Zimmerman v. Poindexter*, 74 F. Supp. 933, 936; *Wigmore on Evidence*, Vol. 8, Sec. 2379.

II.

If any privilege existed, it was waived.

If in fact any privilege of nondisclosure was applicable in favor of the Government, it was waived when the Government came into court as an actual party in interest. As a litigant it must disclose everything relating to the transaction upon which it bases its suit. In *United States v. Andolschek*, 142 F. (2d) 503, 506, the court said:

"* * * While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they

directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully."

See also:

United States v. General Motors Corporation, 2 F. R. D. 528;
Bowles v. Ackerman, 4 F. R. D. 260;
Fleming v. Bernardi, 4 F. R. D. 270;
Walling v. Richmond Screw Anchor Company, 4 F. R. D. 265;
Brewer v. Hassett, 2 F. R. D. 222;
Bank Line v. United States, 163 F. (2d) 138;
United States v. Burr, 25 Fed. Cases 30, 34.

The Government brought this case out into the open. When it did that it brought into the open everything—all evidence—relating to the case. Whatever privilege may have attached to the evidence, or any part of it, before the suit was filed was waived by its filing. This same reasoning would have applied to the *Boske* case if the United States had been a party to that suit. It would be a novel rule, indeed, that would permit one litigant to admit, as did the Government here, that it has evidence in its possession—even in open court (R. 217)—and then deny the power of the court to compel production. The Government's attorney, referring to the documents called for, told the court: "I have them here and I still refuse to produce them." (R. 218.) It was not claimed that they were immaterial—an objection de-

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terminable by the court alone—but simply that they were privileged. It was not claimed that they did not relate to the transaction the Government had brought into court. To the contrary, it was in effect admitted that they did. The only claim urged was that the Attorney General had decided that they were privileged and that the attorney representing the Government had come before the court only for the purpose of communicating this decision, allegedly final in character, to the court.

We submit that if the evidence called for was privileged in the first instance, the privilege was waived. The Government is not entitled to bring a transaction or a cause of action into court and at the same time withdraw its evidence from the control of the court.

III.

The Government's position is in conflict with Supplement No. 2 to Order No. 3229, promulgated by the Department of Justice June 6, 1947.

Supplement No. 2 to Order No. 3229 applies specifically to a subpoena *duces tecum*, but it involved a recognition by the Department of Justice that the question of privilege is one to be determined by the court and not by the Attorney General. We quote the following from the recently decided case of *United States of America, ex rel. Roger Touhy, Relator, vs. Joseph E. Ragen, Respondent, George R.*

McSwain, Appellant (U.S.C.A. (7th Cir.), decided February 24, 1950), setting forth the provisions of Supplement No. 2:

"The directive so far as here material provides:

" 'Therefore, the officer or employee should, unless directed to the contrary by The Attorney General, bring with him the records and documents which are called for by the subpoena even though the Department takes the position that it is not necessary to produce them. Thus, a subpoena is complied with, although a reason is offered for not actually submitting the documents requested.'

"It provides further:

" 'It is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee to comply with the subpoena by submitting the regulation of the Department (Order No. 3229) and explaining that he is not permitted to show the files.'

"Immediately following that which we have just quoted is a statement which while somewhat confusing and ambiguous appears to amount to a contraction of the unlimited privilege otherwise possessed by the Department of Justice. The directive provides:

" 'If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed. The records should be kept in the United States Attorney's office or some

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similar place of safekeeping near the court room. Under no circumstances should the name of any confidential informant be divulged.' "

Supplement No. 2, although applying specifically to a subpoena *duces tecum*, constitutes a direct recognition by the Department of Justice that the question of privilege is one to be determined by the court and not by the Attorney General. The order of the district court in this case required production of the documents for its inspection. Supplement No. 2 provides that "the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed." It appears, therefore, that compliance with Supplement No. 2 by the Assistant Attorney General trying this case for the Government would have been compliance with the order of the district court. Why, then, was Supplement No. 2 not produced in the trial of this case? No answer has been given in the Government's brief.

Supplement No. 2 was directly involved in the case above cited, *Touhy v. Ragen*. The United States Attorney in that case offered to provide the disputed documents to the court for its personal inspection. The court was unwilling, in the absence of opposing counsel, to examine the material for the purpose of determining its materiality and whether it was in the best interest that such information should be disclosed. The Court of Appeals held that "this was the precise duty imposed upon the court." Similarly, in this case, the district court held that "I am not convinced that the matter of privilege should be left ex-

clusively to the Attorney General, but I believe it is my duty to determine this question by an examination of the documents."

The following is quoted from the opinion in the *Touhy* case.

"More than that, in a colloquy between counsel and the court prior to the calling of McSwain as a witness, *the District Attorney offered to provide the documents and material called for in the subpoena to the court for its personal inspection.* This procedure was satisfactory to counsel for the relator, who stated, 'My own feeling is that the proper thing to do would be to permit the Court to examine these things without any of us.' To this proposal, agreed to by counsel for both McSwain and the relator, the court stated, 'I don't want to see them—I don't want to see them without counsel.'

"Thus, the court was unwilling to examine the material for the purpose of determining its materiality and whether it was in the best public interest that such information should be disclosed. *In our view, this was the precise duty imposed upon the court, and McSwain was not required to produce for any other purpose. The court's refusal in this respect, previously announced in open court, perhaps accounts for the fact that McSwain when on the stand was not requested to make production for such purpose.*" (Italics supplied.)

IV.

The claim of the Government that there was a failure to show "good cause."

The first point urged in this Court is a point that was not even mentioned in the district court; that is,

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that the defendants in their motion failed to show "good cause" for the production of the documents.

We have heretofore stated the facts concerning this contention and have shown that it was brought into the case for the first time in the prosecution of the appeal to this Court. It was first mentioned when the appellant filed its "Assignment of Errors and Prayer for Reversal." (R. 222-223.) This was too late. This was a step, not in the trial, but in the prosecution of the appeal which was taken on the same day, November 14, 1949. (R. 221.)

The motion to produce of The Ohio Oil Company was filed October 25, 1947. (R. 33.) The order finally entered requiring production only for inspection by the court to determine the issue of privilege was signed September 19, 1949. (R. 218-220.) The matter was therefore before the court for nearly two years. It was heard on March 11, 1949 (R. 159), again on June 15 and 16, 1949 (R. 196-207), and again on June 13, 1949 (R. 212-218). Full argument was presented, pro and con, at these hearings but there was never any suggestion that the defendants had failed to show "good cause" for the production of the documents. The whole controversy centered around the issue of privilege. That The Ohio Oil Company in its motion attempted to show good cause cannot be denied and we think the showing was sufficient. Be that as it may, no objection was ever urged to the showing. *It was treated as a sufficient showing.*

At the conclusion of the hearing of March 11, 1949, the court announced orally that an order would be made requiring the production of the documents,

but that if privilege was claimed as to any particular document, it would be separated from the others and the issue of privilege as to it determined at a later time. (R. 160.) *This appeal was not taken from that order.* Thereupon, the Government filed its motion "to vacate order of March 11, 1949" and attached thereto the affidavit of the Attorney General setting forth that all of the reports made by agents of the Federal Bureau of Investigation to the Attorney General were confidential and privileged. (R. 161-164.) Thereafter the entire controversy centered around this claim.

This motion of the Government "to vacate order of March 11, 1949" was a direct attack by the Government upon the oral order made on March 11, 1949, to grant the motion to produce of The Ohio Oil Company. (R. 161.) It was the only attack made on that motion in the district court. This motion to vacate was supported by a *single* ground and that was the ground set forth in the affidavit of the Attorney General attached to the motion. (R. 162.) In the motion to vacate it was not claimed, directly or indirectly, that the order should not have been entered because The Ohio Oil Company had failed to show "good cause." Is the Government entitled now to shift its ground on appeal and rely upon such alleged failure, instead of being confined to the single ground set forth in the motion to vacate filed in the district Court?* It pointed out to the district court in plain terms the alleged vice in the order; that is, that the documents were confidential and privileged, as claim-

* Under Rule 46, Rules of Civil Procedure, this cannot be done.

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ed in the affidavit of the Attorney General. It said nothing about a failure on the part of The Ohio Oil Company to show good cause for the production of the documents, which would have justified setting aside the order to produce, privilege or no privilege. On the other hand, if the finding of the Attorney General on the issue of privilege was conclusive as is now urged in this Court, then it would have been impossible to show "good cause" for the production of the documents.

After thus voluntarily and formally tendering the issue of privilege as to all of the documents, the Government refused in open court to permit their inspection by the court to determine the issue of privilege. The attorney for the Government stated that he had been ordered "to come before your Honor and say that I have the reports with me, but it is my instruction to respectfully decline to produce them to your Honor under these circumstances." (R. 217.) And, again the attorney for the Government said: "I have them here, and I still refuse to produce them." (R. 218.) The validity of the court's final order must be determined upon a consideration of the precise nature of the order. The plaintiff was not commanded to produce any document or other evidentiary material for inspection and copying *by the defendants.* They were to be produced merely for the *inspection by the court.* The plaintiff, through an affidavit of the Attorney General, had already voluntarily tendered the claim that they were privileged (R. 162-164) and that issue could not be determined by the *court* without inspecting the docu-

ments. The following is quoted from the record of the hearing held on June 15, 1949, to show the position of the court (R. 205):

"THE COURT: Do you know what that resolves itself into? You are becoming the Judge and ruling whether this stuff should be produced or not. Isn't that inescapable?

"MR. BRITT: No, not exactly, unless under the authority of the Attorney General—

"THE COURT: This is relegating to the Attorney General the responsibility of acting as Judge as to whether these things should be produced.

"MR. BRITT: I guess it does amount to that.

"THE COURT: I will give you time to see. I am not going to grab you by the nape of the neck and force you on that. My desire is to pass on it in accordance with what I believe to be the law.

"MR. BRITT: Am I to inform the Attorney General—

"THE COURT: *My position is this: Before I would rule upon your motion to vacate the order heretofore entered I must see those documents and form my own judgment as to whether or not all or any part of them shall be produced during the trial.*" (Italics supplied.)

Such also was the final position taken by the court. The documents were to be produced only for the court's inspection, in order that it might determine the correctness of the claim of privilege. (R. 217-218.) The court's final judgment recites that the case was dismissed, not for failure to produce for inspection by the defendants, but for failure "to comply

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with the Court's order to produce for its inspection the documents called for in the motions, so it could determine the question of privilege under the law." (R. 220.)

We think the motion of The Ohio Oil Company was entirely sufficient. It was as certain and definite as such a motion could well be, considering its nature, and whether it sufficiently showed "good cause" for producing the documents for inspection and copying by the defendants is a question not here involved. At all events, no formal order was ever entered at any time sustaining the motion of The Ohio Oil Company to produce the documents for inspection and copying by the defendants. A qualified ruling sustaining that motion was orally announced (R. 160) but before any order was entered a claim of privilege applicable to all of the documents was presented, supported by an affidavit of the Attorney General (R. 161-164.) Thereafter the issue was narrowed to this: Should the documents be produced for inspection by the court to enable it to "determine the question of privilege under the law?" (R. 220.) That was the only order to produce that was ever entered—an order entered on the issue voluntarily tendered by the Attorney General that all of the documents were privileged—and it was entered to enable the court to "determine the question of privilege under the law."

Appellant is in effect complaining of something that did not happen on the trial of the case. It seeks a reversal because of the claim that The Ohio Oil Company did not show "good cause" *in its motion.*

It is sufficient to say that no order was ever entered granting the motion and the dismissal was decreed, not for failure to comply with that motion, but for failure to comply with the court's limited ruling that the documents should be produced for the court's inspection. That expressly appears from the final judgment. (R. 220.)

If any showing of "good cause" was required to support the exact and limited order that was entered by the court—an order to produce for inspection by the court in order that it might determine "the question of privilege under the law" (R. 220)—then that "good cause" was supplied not only by The Ohio Oil Company's motion but by the Attorney General's affidavit, setting forth that the documents called for were all privileged. That question was formally tendered by the Government and it had to be determined by the court and not by the Government. The effort to show that it was "exclusively" determinable by the Attorney General himself has wholly failed, as we have heretofore shown.

Appellant in its Assignment of Errors (No. 6) asserts that the motion was insufficient because it failed to *designate* the documents that were to be produced. (R. 223.) That assignment has not been carried into its brief and therefore has not been presented to this Court. It has been waived. But under any view, the correctness of that contention must be tested by the actual situation of fact as shown by the record and not *in vacuo*. The Attorney General knew what documents were desired because he set forth in his affidavit (Par. 2) that he had been informed by his assistants that an order had been en-

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tered "requiring the production for examination and inspection by the Court of certain reports made by agents of the Federal Bureau of Investigation to the Attorney General relating to the subject matter of the above entitled action, in the course of their investigation of this case." (R. 162.) He further set forth in his affidavit "That the inspection by the Court of the said reports is for the purpose of affording the Court an opportunity to determine whether a claim of privilege by the Attorney General is well taken or whether, in the opinion of the Court, the reports should be made available to the defendants for inspection and copying." (R. 162-163.)

In the same affidavit he stated that "deponent has been informed by his assistants in the Antitrust Division *of the nature of the contents of the agents' reports of their investigation of this case.*" (R. 163.) He followed this by a formal claim that all of the correspondence thus described by him and sought to be examined "are privileged," and that the power to determine this issue of privilege is "exclusively within the exercise of the judgment of the Attorney General." (R. 163.)

The Attorney General could not have made the finding that the documents were privileged without knowing what documents were referred to and what they contained. He stated that his assistants had informed him of the nature of the contents of these reports. If he could produce them for his own inspection, he could produce them for the Court's inspection. His representative handling the case, Mr. Britt, was able to identify the documents, because he stated in open court that he had brought

them from Washington to Shreveport and told the court at least twice that he had them in his possession, in open court, but would not produce them because he had been directed by the Attorney General to stand on the claim that they were confidential and privileged.

In determining whether language is vitiated by generality, we must hold in mind the person to whom the language is addressed. *Cooper v. Dasher*, 290 U. S. 106, 109-110, is applicable here. That was a bankruptcy case in which the district court entered a turnover order "for the return by the respondent" of certain property that he had concealed and withheld from the trustee. It was contended, and the Court of Appeals held, Hutcheson, J., writing the opinion, that the order was too general and was fatally defective because it was lacking in the requisite certainty and definiteness and for failure to describe the property to be turned over to the trustee. This Court, in an unanimous opinion written by Mr. Justice Cardozo, reversed this holding of the Court of Appeals and in doing so said:

"Misunderstanding of the mandate is upon the facts in this record an illusory peril. The order gives the only description that the nature of the case allows. The respondent, and no one else, is in a position to supply a better one. *The mandate is addressed to him, and to him its meaning is definite, however indefinite to others.* If it is clear enough to be understood, it is clear enough to be obeyed. 'All evidence,' said Lord Mansfield in *Blatch v. Archer*, 1 Cowper 63, 65, 'is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have

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contradicted.' *Kirby v. Tallmadge*, 160 U. S. 379, 383. The validity of this order is to be subjected to a kindred test. Words after all are symbols, and the significance of the symbols varies with the knowledge and experience of the mind receiving them. The certainty of a description is always a matter of degree. *Doherty v. Hill*, 144 Mass, 465; 11 N. E. 581; *Marks v. Cowdin*, 226 N.Y. 138, 143; 123 N. E. 139. 'In every case the words must be translated into things and facts by parol evidence.' Holmes, J., in *Doherty v. Hill, supra*, p. 468. How many identifying tokens we are to exact the reason and common sense of the situation must tell us. There are times when a restraining order enjoins the commission of acts that are not within the peculiar knowledge of the one to be enjoined. *In re Huntley*, 85 Fed. 889, 893; cf. *Ketchum v. Edwards*, 153 N. Y. 534, 539; 47 N. E. 918. In that event the requirement of definiteness assumes a new importance, and failure to give heed to it may even make the order void. No doubt it is wise, irrespective of the knowledge of the parties, to make the terms of the order as definite as possible. The findings of the referee show that this is what was done. To insist upon more would be to sacrifice the substance of the right to the magic of a formula. In the ensuing war of words the wrongdoer would be enabled to slip away from his pursuers and take advantage of his wrong." (Italics supplied.)

The Attorney General representing the Government knew what was to be produced. If he did not, then he should have required further specification before making the affidavit setting forth that all of the documents were privileged. (R. 163.) The Government's lawyer(Mr. Britt) knew what was to be produced. That satisfies any requisite of certainty.

It cures any failure on the part of the defendants to describe the documents more particularly. It is necessary here to come back to the point that the order was made by the court itself; in effect, on its own motion for the purpose of vindicating its authority to determine the tendered issue of privilege and not by way of sustaining the motion to produce filed by The Ohio Oil Company and other defendants.

If we are to go back to The Ohio Oil Company's motion, then we submit that it was entirely sufficient. It was sufficient to be understood by the Attorney General himself and by his representative. They did not stand on the plea now urged that there was a failure to show "good cause" in the motion. They stood on the plea of privilege.

This alleged failure to show "good cause" is plainly an afterthought. It was presented only in connection with the perfecting of the appeal. The Government's lawyers did not evolve this theory until nearly two months after the trial. The evolution was too late; at least the presentation was too late.

V.

There is no merit in the Government's claim, urged for the first time on appeal, that the production of documents required by the district court's order exceeds the limits of permissible discovery under Rule 34.

What we have said above constitutes a sufficient answer to the claim that the order to produce went beyond the "permissible scope" of discovery. That issue should have been presented to the district court

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and it could have been intelligently determined by it only upon a consideration of the documents—each of them. It is not for a litigant to determine and assert with conclusiveness that a given order to produce goes beyond the "permissible scope" of discovery. That claim must be presented to the judge trying the case. It must be submitted to his sound and informed discretion. When a litigant's attorney has the documents in his actual manual possession in open court and refuses even to let the judge see them, it is difficult to see how that litigant is in a position to say that the order to produce goes beyond the "permissible scope" of discovery.

If the course had been pursued here that was pursued in *United States v. Cohen*, 145 F. (2d) 82, 92, the case might stand in a different light. There the documents in question were inspected first by the trial judge and, believing that they had no impeaching value—and it was claimed that they did have impeaching value—, he sealed them and they were made a part of the record on appeal. The appellate court (2d Circuit, opinion by Learned Hand) again examined them and arrived at the same conclusion. See also, by the same court, *United States v. Krulewitch*, 145 F. (2d) 76.

It must be remembered that objections to a discovery, like objections to the admissibility of evidence, are determinable, not by the litigant, but by the court. The litigant is entitled, and is required, to present objections, but he is not entitled to decide them. The appellant filed a written motion to vacate the oral order of March 11, 1949, requiring production of the documents, and, pursuant to the require-

ments of Rule 46, set out the ground—the single ground—upon which it relied. It is too late to now bring in other grounds.

VI.

Conclusion

To review all of the authorities, or any considerable number of them, cited in the Government's brief would unduly extend this brief and would be to present matter having no bearing upon a proper settlement of the appeal. It is sufficient to say that without exception they are inapplicable; they are not in point, either in their determination of the issue of privilege or the issue of "good cause." Insofar as they are cited on the privilege question, they are not in point because in them the issue of privilege was determined by the court and not by an executive officer. Here there was a refusal in open court even to permit the court to inspect the documents, without which no question of privilege or whatnot affecting their admissibility could be determined. Insofar as they deal with the issue of "good cause," they are equally lacking in pointed application. As we have before shown, rather tediously and with perhaps undue repetition, that issue is presented here in an entirely novel light. It was presented too late. The issue was determined by the Attorney General without the intervention of the court. None of the authorities cited hold that a litigant is entitled to determine for himself this issue of "good cause." He must submit it to the trial judge and that was

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never done in this case. We further submit that the appellant is complaining of an order never entered—an order granting The Ohio Oil Company's motion and requiring the plaintiff to produce for inspection and copying by the defendants. The only order entered was one, as the judgment recites, requiring the plaintiff to produce for the court's inspection "the documents called for in the motions, so it could determine the question of privilege under the law." (R. 220.)

We further submit that if any error was committed in respect to this "good cause" issue, it was harmless error under Rule 61 of the Rules of Civil Procedure and under new Title 28, U.S.C., Sec. 2111. The failure to present the point to the trial court was sufficient evidence of that fact. For nearly two years, and during at least four hearings, the Government made only one objection to the motion to produce—privilege. It did not question the sufficiency of the showing of "good cause." It moved to set aside the order of March 11, 1949, but not on that ground. It was treated as an inconsequential matter by the Government, not worthy of notice. It is too late to notice it for the first time on appeal. Rule 61 and new Title 28, U.S.C., Sec. 2111, plainly apply.

What we have above said applies also to the claim that The Ohio Oil Company's motion to produce went beyond the "permissible scope" of discovery. The issue thus tendered could be determined only upon examination of the documents, one by one. When appellant refused to permit this to be done, it waived this point. In fact, not a single question raised by

the appellant is determinable so long as the appellant holds the documents and refuses to permit the court to examine them. The very nature of each and all of the questions required such examination.

Finally, we submit that there is no merit in any of the points raised in the Government's brief unless it be first held that the power was vested in the Attorney General "exclusively," as was claimed in open court, to determine the issue of privilege. (R. 163.) With that point determined adversely to the Government's contention and in favor of the court's power to make such determination, all other contentions of the appellant vanish from the case.

Appellees pray that the judgment appealed from be affirmed.

Respectfully submitted,

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